MARTIN R. GLICK (No. 40187)
Email: mglick@howardrice.com
SHAUDY DANAYE-ELMI (No. 242083)
HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, California 94111-4024
Telephone: 415/434-1600
Facsimile: 415/217-5910

HAL K. LITCHFORD (*pro hac vice*)
G. STEVEN FENDER (*pro hac vice*)
KEITH E. ROUNSAVILLE (*pro hac vice*)
LITCHFORD & CHRISTOPHER
Professional Association
Bank of America Center
390 North Orange Avenue
Post Office Box 1549
Orlando, Florida 32802-1549
Telephone: 407/422-6600
Facsimile: 407/841-0325

Attorneys for Plaintiffs
GABANA GULF DISTRIBUTION, LTD., and GABANA DISTRIBUTION, LTD.

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A Professional Corporation

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ROOTS READY MADE GARMENTS CO. W.L.L.,

Plaintiff,

v.

THE GAP, INC., a/k/a, GAP, INC., GAP INTERNATIONAL SALES, INC., BANANA REPUBLIC, LLC, and OLD NAVY, LLC,

Defendants.

Case No. C 07 3363 CRB

Action Filed: June 26, 2007

GABANA'S OPPOSITION TO ROOTS READY MADE GARMENTS' MOTION TO CONSOLIDATE

Date: August 24, 2007
Time: 10:00 a.m.
Place: Courtroom 8, 19th Floor
Judge: Hon. Charles R. Breyer

Trial Date: December 3, 2007

INTRODUCTION

Though Roots Ready Made Garments Co., W.L.L. ("Roots") has been aware of the litigation between Gabana Gulf Distribution Ltd. and Gabana Distribution Ltd. (collectively, "Gabana") on the one hand, and Gap International Sales, Inc., The Gap, Inc., Banana Republic, L.L.C. and Old Navy, L.L.C. (collectively, "Gap") on the other, since the litigation began, Roots only now seeks to insert itself into the case, after the parties have been litigating for over a year, and as discovery draws to a close in just two weeks. Roots' late appearance on the scene threatens to disrupt the Gabana-Gap litigation altogether and, as explained more fully below, is not warranted under the law in any event. Roots' motion to consolidate should be denied.

BACKGROUND

Gabana filed suit against Gap on April 14, 2006, and amended its complaint on April 24, 2006. *See* Gabana's First Amended Complaint ("Gabana's FAC") (Docket No. 3 in action No. C 06-2584 CRB (EDL)). In its First Amended Complaint, Gabana alleged that Gap breached the parties' franchise agreement by wrongfully terminating it in contravention of the California Franchise Relations Act ("CFRA"). Gabana also asserted other theories for breach of contract, various business torts, unfair and unlawful business practices, a quantum meruit claim, and sought a declaratory judgment that Gap has continuing obligations to Gabana under their franchise agreement, which would have been alive but for Gap's wrongful termination. *See* Gabana's FAC ¶¶ 39-81.

Written discovery between the parties began on July 28, 2006. Declaration of G. Steven Fender in Support of Gabana's Opposition to Roots Ready Made Garments' Motion to Consolidate ("Fender Decl.") ¶3. To date, Gabana and Gap have engaged in the following discovery: (1) a two-day deposition of Gabana Gulf pursuant to Federal Rule of Civil Procedure 30(b)(6);[1] (2) full day depositions of key Gap witnesses Ron Young (current

[1]Gabana's principal, Francois Larsen, traveled from Geneva, Switzerland to San (continued . . .)

Gap employee) and Jon Ehlen (former Gap employee); (3) document productions responding to two sets of requests, yielding tens of thousands of pages of documents; (4) multiple rounds of interrogatories; (5) three discovery motions; and (6) retention of experts. Fender Decl. ¶4.

Roots filed its Complaint against Gap on June 26, 2007—over a year after the Gabana-Gap litigation commenced. Fact discovery in the Gabana-Gap litigation closes, with just a few exceptions, on August 15, 2007. Fender Decl. ¶5. The Gabana-Gap trial is set to commence on December 3, 2007. *See* Docket No. 26. Discovery has not begun in the Roots-Gap litigation. Indeed, Gap's response to Roots' complaint has not yet become due. Roots states that Gabana supports Plaintiff's Motion to Consolidate. *See* Motion to Consolidate Related Actions Pursuant to Fed. R. Civ. P. 42(a) (Docket No. 18) ("Motion") at 3:19. However, Roots' statement reflects a misunderstanding. *See* Fender Decl. ¶6-7.

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LEGAL STANDARD

Federal Rule of Civil Procedure 42(a) provides in relevant part that "[w]hen actions involving a common question of law or fact are pending before the court, it may order . . . the actions consolidated . . . ." Fed. R. Civ. 42(a). District Courts have broad discretion under Rule 42(a) to consolidate cases. *Investors Research Co. v. United States Dist. Court for the Cent. Dist. of Cal.*, 877 F.2d 777 (9th Cir. 1989). Apart from assessing whether common questions of law or fact exist, the Court must also "weigh the interest of judicial convenience against the potential for delay, confusion and prejudice caused by consolidation". *See Southwest Marine, Inc. v. Triple A Mach. Shop, Inc.*, 720 F. Supp. 805, 807 (N.D. Cal. 1989).

(. . . continued)
Francisco for this deposition.

ARGUMENT

I.

CONSOLIDATION IS INAPPROPRIATE IN THIS CASE.

A. Consolidation Is Unwarranted Because The Two Actions Do Not Share Sufficiently Common Questions Of Fact Or Law.

Roots asserts that Gabana and Roots have "[t]he same legal theories." Motion at 4:13. This is incorrect. While both Gabana and Roots have claims for breach of contract against Gap, the contracts at issue differ in material respects (*e.g.*, their parties, terms, and form); each raises its own unique legal issues. Gabana's contract claim involves application of the California Franchise Relations Act whereas Roots' contract claim triggers entirely unrelated legal questions regarding the requirements for oral agreements and third party beneficiary status.[2] Simply alleging breach of contract against a common defendant does not create sufficient commonality for consolidation purposes. *See Enterprise Bank v. Saettele*, 21 F.3d 233, 236 (8th Cir. 1994) (denying consolidation where "[b]oth cases involved breach of contract claims against the [same defendants]" because "the fact that the [same people] were defendants in both cases" was a "common factual thread" but an insufficient one).

While both Gabana and Roots have claims against Gap for unfair business practices and for various business torts, these broad allegations do not predominate—the plaintiffs' respective individual issues do: "even where cases involve some common issues of law or

[2]To the extent that Roots takes the position that the Gabana Action and the Roots Action involve the same agreement because Roots was a third party beneficiary to the Gabana-Gap agreement, Roots' argument is without merit. It is manifest from the face of the Gabana-Gap agreement that Roots was, *at best*, an incidental beneficiary to the agreement; a third party that enjoys only an incidental benefit from an agreement cannot enforce the agreement's terms. *See TXU Energy Retail Co. LP v. Agri-Cel, Inc.*, No. C-01-20289 RMW, 2006 U.S. Dist. LEXIS 62385 at *24 (N.D. Cal. Aug. 17, 2006) ("It is well settled . . . that Civil Code section 1559 excludes enforcement of a contract by persons who are only incidentally or remotely benefited [sic] by the agreement"). Roots cannot force its way into the Gabana-Gap litigation by making facially deficient legal claims.

fact, consolidation may be inappropriate where *individual issues predominate*." *Allen v. Woodford*, No. 1:05-cv-01104-OWW-LJO, 2006 U.S. Dist. LEXIS 93150, at *31-32 (C.D. Cal. Dec. 22, 2006) (emphasis added) (citing cases). Here, for the past year, motion practice and discovery has revolved around (and borne out) Gabana's claim for breach of a franchise agreement. Roots has no role in this critical fight, which is at the heart of the Gabana-Gap litigation. This difference between Gabana's and Roots' respective cases is significant, and renders consolidation inappropriate. *See In re Consolidated Parlodel Litig.*, 182 F.R.D. 441, 446 (D.N.J. 1998) (consolidation inappropriate where each case requires "copious evidence unique to each Plaintiff's case"); *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 371 (2d Cir. 1993) (plaintiffs' injuries included such diverse conditions as to negate any commonality of fact).

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B. Consolidation Is Neither More Efficient In This Case Nor Necessary To Protect Against Inconsistent Results.

Without having attended a single deposition and without having seen a single document produced in the Gabana-Gap litigation, Roots asserts that its case involves the "same witnesses," the "same documents" (Motion at 4:9-12), and that Roots is "committed to preserving the December 3, 2007 trial date." *Id.* at 5:17-18. However, precisely because Gabana's and Roots' respective claims involve different legal and factual questions, discovery to date has not been calculated to prove up Roots' claims. Fender Decl. ¶8. The depositions of three out of the four of the "same witnesses" listed by Roots have already come and gone, and Roots' assumption that Gabana has obtained the documents Roots will need to prove its case is a blind one. *See id.* ¶¶9-10. Quite simply, if Roots truly intends to rely on discovery to date, then Roots has little to no evidentiary support for its case. Thus, if the cases were consolidated, Roots would, no doubt, angle to stretch discovery out, which in turn would delay Gabana's upcoming trial date, and disrupt the momentum of Gabana's suit against Gap. Because there is no "duplicative discovery" to avoid, consolidation would lead to delay without achieving any counterbalancing efficiency. *Cf. Lloyd v. Industrial Bio-Test*

Lab., Inc., 454 F. Supp. 807, 812 (S.D.N.Y. 1978) (delay as a result of consolidation considered minimal, and offset by avoidance of duplicative discovery and trial).

Apart from efficiency concerns, consolidation is " . . . used to combine actions so as to avoid producing inconsistent or conflicting results." 8 J. Moore, *Moore's Federal Practice* §42.10[4][d] (3d ed. 2007). But there is no threat of inconsistent or conflicting results in this case. Gabana alleges that it paid Gap a $6 million fee to enter into a franchise agreement with Gap, which Gap impermissibly terminated. Gabana's FAC ¶18. Roots does not dispute this. *See, e.g.*, Roots' First Amended Complaint (Docket 22) ("Roots' FAC") ¶77 (not specifying whether Roots paid Gap or Gabana $6 million for the merchandise); Motion at 2:12-13 (admitting that Roots "*ultimately*" paid $6 million for the merchandise—*i.e.*, only after Gabana paid Gap $6 million for the merchandise) (emphasis added). Presumably Roots will argue that Gap induced Roots to purchase the $6 million inventory from Gabana, and in that connection promised Roots ISP rights, which it did not deliver. Thus, Gabana's and Roots' claims are not inconsistent—Gap could be deemed to have impermissibly terminated its franchise agreement with Gabana and also to have breached an oral contract with Roots. Nor would it be inconsistent for either Gabana's or Roots' claims to prevail, without both their claims prevailing.

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C. Even If There Was Sufficient Commonality Between The Two Actions, Consolidation Would Still Be Inappropriate Because It Is Likely To Cause Delay, Confusion, and Prejudice.

As discussed above, discovery to date has not been geared towards supporting or defending against Roots' driving legal theories. Accordingly, Roots' aspiration to preserve the Gabana-Gap trial date with Roots in the case and at counsels' table is unrealistic. Consolidation is inappropriate where there are considerable differences in trial readiness. *See Mills v. Beech Aircraft Corp.*, 886 F.2d 758, 762 (5th Cir. 1989), *aff'd*, *Lewis v. Four B. Corp.*, 211 Fed. Appx. 663 (10th Cir. 2005) (consolidation denied where one party ready for trial and one not); *Lewis v. Four B. Corp.*, 347 F. Supp. 2d 1017, 1020 (D. Kan. 2004) (refusing to consolidate though the actions arose from the same disciplinary incident because

discovery in the first had been completed for several months, but had not yet begun in the second action). Here, Gabana and Gap are on the verge of concluding their extensive discovery; Roots has not begun its own nor has Gap started its discovery of Roots. Moreover, Gap is a large corporate defendant, in custody and possession of voluminous documents. As Gap has at least assented in discovery motions with Gabana, document productions of the magnitude required in this type of litigation can be significant and burdensome. Accommodating Roots' belated desire to join the Gabana-Gap litigation will, therefore, undoubtedly cause delay as Roots must catch up on a year of litigation, including burdens on it that it may not waive.

Consolidation in this case will also cause unnecessary confusion—something antithetical to the overarching purpose of Rule 42. *See* 9 C. Wright & A. Miller *Federal Practice and Procedure* §2383 at 441-42 (2d ed. 1995) (" . . . a motion under Rule 42(a) may be denied if the common issue . . . will lead to confusion or prejudice in the management or trial of the case"). The fact that the $6 million inventory is at issue in both Gabana's and Roots' respective cases—as a franchise fee in one and as consideration for an oral contract in the other—while not legally or logically inconsistent, is likely to confuse jurors or cause prejudice.

Consolidation could prejudice Gabana in another way as well. Gap has taken the position that Gabana must indemnify Gap for Roots' claims against Gap. Fender Decl. ¶11. Gabana concluded, and has explained to Gap, that the latter's argument has no merit. Nonetheless, Gap's position on this point places Gabana in the position of simultaneously supporting and opposing Roots' claims against Gap. *See* 9 C. Wright & A. Miller *Federal Practice and Procedure* §2383 at 445-46 (2d ed. 1995) ("Consolidation often is improper if it aligns a party in a portion of the litigation with other parties with whom he or she has a conflicting interest in other portions of the consolidated litigation").

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A Professional Corporation

II.

IN THE EVENT THAT THE COURT DEEMS PRETRIAL CONSOLIDATION APPROPRIATE, GABANA'S AND GAP'S PREARRANGED DISCOVERY SCHEDULE SHOULD REMAIN UNDISTURBED.

It has been exceedingly challenging—nearly prohibitively so—for Gabana and Gap to schedule a number of international depositions of individuals, several of which neither party controls, and many of whom require a translator present. Fender Decl. ¶12. Gabana and Gap have finally been able to plan these depositions; inclusion of Roots threatens to throw the already precarious schedule off. In the event that the Court orders consolidation of the Gabana and Roots cases for discovery purposes, Roots should be permitted to attend remaining depositions but not to disrupt scheduling. Roots should be permitted to attend these depositions provided it agrees to produce its primary witness and chairman, Ashraf Abu Issa, to be deposed during the depositions now scheduled for the second week of September, and agrees to limit its questioning of the witnesses that week to no more than on half day.

As to the remaining domestic depositions, Gabana's scheduled 30(b)(6) deposition of Gap is presently estimated to last half a day, and its deposition of former Gap attorney and director, Julie Kanberg, is estimated to last two hours. The Court should therefore consider appropriate restrictions on Roots' participation in these depositions.

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CONCLUSION

Roots took no action while it watched Gabana and Gap litigate vigorously for over a year. Now that Gabana and Gap approach trial, Roots has decided to insert itself in a litigation that mainly revolves around a written franchise agreement—something with which Roots has no direct involvement. Consolidation at this stage is unwarranted, unfair, and would not achieve any of the primary purposes underlying Rule 42. Roots' motion should be denied.

DATED: August 3, 2007.

Respectfully,

MARTIN R. GLICK
SHAUDY DANAYE-ELMI
HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
A Professional Corporation

HAL K. LITCHFORD
G. STEVEN FENDER
KEITH E. ROUNSAVILLE
LITCHFORD & CHRISTOPHER
Professional Association

By: /s/
MARTIN R. GLICK

Attorneys for Plaintiffs GABANA GULF DISTRIBUTION, LTD., and GABANA DISTRIBUTION, LTD.

HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN
A Professional Corporation